> Finally, I have to say something about the alcohol issue. I don't know why anyone is suggesting that there is some sort of attempt at character assassination of Ms. Smith. Has anyone from BMW said that? I don't think so. We reported a fact that wasn't a surprise because it was on the police report. .136. This is a highly significant fact which can explain everything that happened in this accident. It was reasonable, appropriate, in fact, it would be wrong not to point this out. You have to decide its consequences.

These sentences – nine lines of transcript – are the entirety of BMW's references to Smith's fault in a 25-page closing argument that focused almost entirely on the technical evidence concerning the design and performance of the air bag system in Smith's vehicle.

Petitioner agreed to the use of the general verdict form. The district court presented the jurors with two forms, allowing the jury only to "find for the defendants" or to "find for the plaintiff." When asked during the charge conference whether Petitioner had objections, counsel replied, "No objections, Judge, to the instructions or the verdict form." The jury returned the general verdict for defendants.

On appeal to the Eighth Circuit, Petitioner assigned error only in the admission of Smith's intoxication as evidence of comparative fault. Petitioner's brief stated as the sole issue, "Whether the district court properly admitted evidence of Kimberly Smith's blood alcohol content and its effect as proof of comparative fault in a crashworthiness case." Petitioner did not assign any error in the jury's rejection of the merits of the claim that BMW's air bag system malfunctioned and caused Smith's injury.

BMW argued and presented authorities on appeal supporting the conclusion that Arkansas law and policy strongly support the admission of the evidence of Smith's intoxication as proof of comparative fault.[7] The thrust of BMW's arguments to the Eighth Circuit, however, was that the air bag system in Smith's vehicle performed as designed in the accident and that she was injured during the vehicle's rollover, an injury that the air bag could not have prevented. BMW demonstrated that the evidence at trial supported the finding, which Petitioner did not challenge, that the vehicle was not defective under the Arkansas Product Liability Act and that BMW was not negligent in designing the vehicle. The record, BMW contended, overwhelmingly supported the verdict in BMW's favor without a consideration of Smith's comparative fault.

The decision of the Court of Appeals avoided the state law comparative fault issue. The court found that the record and the general verdict did not require consideration of the issue Petitioner raised on appeal. Rejecting Petitioner's contention that the verdict was based on the purported error in admitting the alcohol evidence, Judge Hansen's opinion found it "just as likely" that the jury reached one of two other reasonable conclusions on the merits of the products liability claim:

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[7] *Miles v. General Mtrs.*, 262 F.3d 720; *Keltner v. Ford Mtr. Co.*, 748 F.2d 1265 (8 Cir. 1984); Restatement (Third) of Torts, Products Liability § 16 cmt. f (1998); William J. McNichols, *The Relevance of the Plaintiff's Misconduct in Strict Tort Products Liability, The Advent of Comparative Responsibility, and the Proposed Restatement (Third) of Torts*, 47 Okla. L. Rev. 201, 275 (Summer 1994).

a) The air bags properly did not deploy in the initial stages of the accident; or

b) The neck injury was unrelated to the air bag and occurred later in the accident when the vehicle rolled over.

The court, therefore, refused to decide the evidentiary question and unanimously affirmed the judgment for BMW.

REASONS WHY THE WRIT SHOULD BE DENIED

I. Consideration of Petitioner's issue would require the Court implicitly to decide an issue of state law.

Petitioner asks the Court to remand this case to the Court of Appeals based on a *presumption* of legal error in the district court's decision on a question of state law.[4] Certiorari should not be granted for the purpose of deciding questions of state law. Whether the Arkansas Supreme Court would hold that a driver's comparative fault in causing an accident is admissible under the Arkansas Comparative Fault Statute is not an issue that should be decided in the first instance by this Court. Petitioner does not make so bold an assertion, but the Question Presented requires a conclusion that the admission of evidence of comparative fault was error. Yet the Court of Appeals (much less the trial court) has made no such ruling. Only

[4] Indeed, the Petition states the question as whether the judgment "may be affirmed despite *legal error* at trial where it cannot be determined whether the jury relied upon the *legal error* in rendering its verdict." [Petition at i (emphasis supplied)]

after presuming that the record contains such a ruling could the Petitioner ask the Court to decide whether the Court of Appeals should have affirmed the judgment based on the general verdict.

The issue Petitioner seeks to raise, *viz.* how a Court of Appeals should analyze a general verdict tainted with legal error, is simply not ripe for consideration on this record. Whether such a question would be worthy of the Court's attention in a case in which the Court of Appeals actually found legal error in a ruling by the district court, but yet affirmed a general verdict, is a question for another day. This case presents no such issue.

II. Petitioner waived objection to the general verdict form; therefore, the Court of Appeals properly refused to consider the alleged evidentiary error.

Petitioner seeks remand by complaining that the Court of Appeals erroneously found that the general verdict did not support consideration of the state law issue Petitioner raised on appeal. This result is the direct, necessary consequence of decisions that were part of Petitioner's deliberate litigation strategy. The record shows that Petitioner agreed to submit the case on a general verdict form, Petitioner did not object to either the verdict form or the jury instructions on driving while intoxicated and comparative fault, and Petitioner did not appeal the sufficiency of the evidence that supports the jury's verdict even without consideration of the allegedly improper evidence.

On this record, the Court of Appeals appropriately avoided deciding the Arkansas comparative fault issue

Petitioner raised on appeal by finding it "at least as likely" that the jury found for BMW without considering the evidence of Smith's comparative fault. The Court of Appeals correctly recognized that Petitioner's claim easily could have been rejected on the merits of the products liability issues of defect and negligence – a basis that Petitioner did not appeal. This case, therefore, does not merit consideration by this Court.

The record does not support application of the principles of *Maryland v. Baldwin*, 112 U.S. 490 (1884), to the general verdict that rejected Petitioner's claim against BMW. *Baldwin* does not change the rule that an appellant challenging the admission of evidence at trial bears the burden of demonstrating that the alleged error affected substantial rights. Fed. R. Evid. 103(a)(1); Fed. R. Civ. P. 61; 28 U.S.C. § 2111; *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) ("it is well settled that the appellate courts should act in accordance with the salutary policy embodied in Rule 61"). "[E]rror in the admission or exclusion of evidence is harmless if it does not affect the substantial rights of the parties, and the burden of demonstrating that substantial rights were affected rests with the party asserting error." *K-B Trucking Co. v. Riss Int'l Corp.*, 763 F.2d 1148, 1156 (10 Cir. 1985). *See also Qualley v. Clo-Tex Int'l, Inc.*, 212 F.3d 1123, 1128 (8 Cir. 2000) ("An abuse of discretion occurs when the error prejudicially influences the outcome of the case, . . . and the burden of showing prejudice rests on the party asserting it.").

Under these authorities, Petitioner's appeal of the district court's evidentiary ruling required a showing that the comparative fault evidence was admitted in error *and* that the jury reached an issue that required consideration

of the evidence of Smith's comparative fault. Because Petitioner failed to make this showing, the Court of Appeals was not required to consider the issue raised on appeal.

Petitioner should not be heard to complain of the consequences of its own strategy, which developed over years of litigation. The evidence of Smith's conduct in causing the accident was an issue from the very inception of this suit. BMW pleaded comparative fault in its answer. The trial judge ruled before trial, agreeing with his predecessor judge, that a qualified toxicologist should be permitted to testify concerning Smith's intoxication and its effects. Following this testimony, Petitioner did not object to the court's instructions to the jury that if BMW were found at fault, Arkansas law required a comparison of BMW's fault and Smith's fault, if any, and that the Arkansas comparative fault statute barred recovery if Smith's fault was "equal or greater in degree than any fault chargeable" to BMW. Petitioner also did not object to the general verdict, although in the event of a verdict for BMW, the use of this verdict form might preclude a determination of the specific basis for that verdict.

No injustice has been done because Petitioner could have avoided the verdict that it now complains is inscrutable. Under Federal Rule 49(b), Petitioner could have asked the court to submit a general verdict accompanied by interrogatories that would have revealed the jury's specific findings on the issues and facilitated examination of those findings on appeal. However, for reasons known only to Petitioner and Petitioner's counsel, Petitioner agreed to the use of the general verdict form, making no objection to the form of verdict or to the jury instructions on drinking and driving and comparative fault. Petitioner chose not to exercise the right to request specific findings

from the jury. Had Petitioner made such a request and made and preserved an objection to the general verdict, then the Court of Appeals might have been obliged to consider the underlying evidentiary issue. However, Petitioner failed to meet these requirements.

Petitioner further thwarted a favorable appellate ruling by failing to challenge BMW's evidence that the air bag system in the 318i performed properly in Smith's accident. The jury was instructed that a verdict for Petitioner required two findings: the jury was required first to accept Petitioner's evidence of BMW's fault and then to weigh that fault against Smith's fault, if any, and to find that BMW's fault was greater. Petitioner's appeal addressed only the second finding. Petitioner's failure to argue on appeal that the evidence established BMW's fault precluded reversal of the verdict. Because Petitioner's appeal did not raise an issue as to the design or performance of the air bag, the Court of Appeals could not find in Petitioner's favor on this issue. Therefore, even if the comparative fault evidence was admitted in error as Petitioner argued, affirmance was required because Petitioner's appeal did not allow the court to find that the evidence supported a finding of fault chargeable to BMW.

Petitioner's acquiescence in the use of a general verdict – coupled with Petitioner's failures to object to jury instructions and to appeal the rejection of its claim on the merits – precluded a showing of reversible error.

III. The Eighth Circuit found that any error in admitting the comparative fault evidence was harmless because the jury reasonably could have found for BMW without considering that evidence.

The Petition asks the Court to remand based on a presumption that the jury considered the alcohol evidence. The opinion of the Court of Appeals demonstrates that this presumption is not justified. The court explicitly recognized that, although the jury might have weighed the parties' comparative fault in reaching its verdict, it is "likely" that the case was decided on the merits of Petitioner's products liability claim, a basis that Petitioner did not appeal. Judge Hansen's opinion found two other possibilities "at least as likely" as a decision based on comparative fault. As BMW argued on appeal and the Eighth Circuit found,

> First, BMW put on evidence at trial from which the jury could reasonably conclude that there was no defect or negligence because the force and direction of the car's impact into the hillside were insufficient to trigger deployment of a properly operating driver's-side frontal-impact airbag. Second, BMW put on evidence at trial from which the jury could reasonably conclude that Smith's injuries occurred during the rollover – when deployment of the airbag would not have helped, as Smith conceded – rather than during the impact of the car into the hillside.

[Pet. App. 6a] The Court of Appeals thus expressly rejected the presumption Petitioner seeks: a presumption that the jury reached a decision based on the alcohol evidence. Such a presumption would, therefore, be inappropriate, and remand would be futile because the Court of Appeals

has found that the jury likely did not consider the challenged evidence.

IV. Neither *Baldwin* nor its progeny requires a different result in this case.

The plaintiff who appealed in *Baldwin* demonstrated an error that affected substantial rights because the challenged evidence was relevant to an essential element of his claim, *i.e.*, his status as a beneficiary of the estate whose administrator he had sued for malfeasance. The jury necessarily considered the improper evidence – hearsay that impeached a witness on the issue of the marriage of plaintiff's parents – because it was directed to a threshold element of plaintiff's case. The jury had to consider the evidence and find that plaintiff was an heir before the defendant was required to prove any of its defenses, which pleaded generally that plaintiff had received everything to which he was entitled as an heir. In contrast, the challenged evidence in this case – proof of Smith's comparative fault – is not directed to a threshold element of the plaintiff's case, but to an affirmative defense that the jury was instructed to consider only if it first found against the defendant on the merits of the products liability claim. This critical distinction removes the present case from the *Baldwin* "general verdict" rule.

This Court's case law cited at pages 7-8 of the Petition as illustrating the proper application of *Baldwin* is likewise inapposite. Each of the cases Petitioner cites involved a general verdict for a plaintiff on a multi-count claim, and a defendant's appeal assigning error that tainted fewer than all counts. In each case, the jurors necessarily considered the allegedly improper evidence, instruction, or

legal theory – even though it may or may not have been the basis for the general verdict. In contrast, in this case, the general verdict was for the defendant, and the plaintiff's appeal assigned an error in the admission of evidence that was relevant only to an affirmative defense that the jury was instructed to consider only after finding the defendant at fault. Assuming the jury followed its instructions concerning the evidence and issues,[9] and because the plaintiff did not assign error in the jury's rejection of the merits of the products liability claim, the Court of Appeals properly found that the jury could have rejected plaintiff's claim on the merits without reaching the affirmative defense or considering the comparative fault evidence relevant only to that defense.

None of the cases cited in the Petition as following the *Baldwin* principle present the peculiar circumstances of this case: an appellant who orchestrated a scenario on appeal that precluded a showing of reversible error. Even accepting the Petition's contention that courts have treated general verdicts based on alleged error inconsistently, this case is not an appropriate case for resolving those inconsistencies. If this case is an anomaly, as the Petition suggests, it is an anomaly only because Petitioner chose to make it so by constructing a record that allowed the Court of Appeals to affirm without deciding an issue that the jury "likely" did not reach.

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[9] It must be presumed that the jury followed the instructions. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000); *Sloan v. Motorists Mut. Ins. Co.*, 368 F.3d 853, 856 (8 Cir. 2004).

V. Petitioner asks the Court to destroy the utility of the general verdict form by presuming prejudicial error.

Having forfeited the ability to demonstrate the basis for the jury's verdict, Petitioner seeks a presumption that the jury decided for BMW based on the evidence of Smith's drinking and driving. Neither *Baldwin*, statute, case law, nor court rule requires the result Petitioner seeks: "a presumption that a prejudicial error affected the decision of the jury." *See* Petition, p. 9. A general verdict does not invariably result in a presumption of prejudice from every error assigned on appeal. If such were the law, courts and litigants long ago would have abandoned the general verdict.

As the Petition recognizes, "[m]ost jury-tried civil cases in federal courts are resolved and always have been by a general verdict in which the jury finds for the plaintiff or for the defendant." Wright, Charles A. & Miller, Arthur R., Federal Practice and Procedure § 2501 (1995). Under Federal Rule 49, the decision whether to submit a case using a general verdict, a special verdict, or a general verdict with interrogatories is within the broad discretion of the trial judge. *Id.* § 2505. As in this case, the parties may agree to any form of verdict that is authorized under Rule 49 and permitted by the trial judge.

Each verdict form permitted under Rule 49 has advantages and disadvantages. Consequently, in many cases, the choice of verdict form is a significant strategic decision for the litigants and a point of contention between opposing parties. The appellate proceedings in this case reveal one potential disadvantage of the general verdict to a plaintiff who seeks review of an alleged error that relates to only one defense theory, here, the affirmative

defense of comparative fault. The manifestation of this disadvantage does not mean, however, that the Court of Appeals must invariably accept an appellant's invitation to delve into the basis for the general verdict or to presume legal error – particularly when the appellant did not object to the use of the general verdict form. Presumably, Petitioner acquiesced in the submission of the case on a general verdict because that verdict form held potential benefits for Petitioner. Petitioner chose and accepted those benefits along with the risks – including the risk that materialized when Petitioner constructed a record and an appellate argument that precluded reversal.

Petitioner would have this Court impose an unjustified presumption that every general verdict that is appealed is the result of prejudicial error. Such a presumption ignores both logic and the myriad variation of issues and parties that allows the *Baldwin* reasoning in some cases but not in others. Such a presumption of error also is contrary to the principles Justice Rehnquist described in *McDonough Power Equipment*,

> We have also come a long way from the time when all trial error was presumed prejudicial and reviewing courts were considered "citadels of technicality." . . . The harmless error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for "error" and ignore errors that do not affect the essential fairness of the trial.

464 U.S. at 553. In *McDonough*, the respondent had obtained a reversal and a new trial on appeal based on a juror's failure to answer a question on *voir dire*. The Court reversed, holding that the respondent had failed to sustain

an appellant's heavy burden to show prejudicial error on appeal.

> To invalidate the result of a three-week trial because of a juror's mistaken, though honest response to a question, is to insist on something closer to perfection than our judicial system can be expected to give. A trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror on *voir dire* examination. Whatever the merits of the Court of Appeals' standard in a world which would redo and reconstruct what had gone before upon any evidence of abstract imperfection, we think it is contrary to the practical necessities of judicial management reflected in Rule 61 and § 2111.

Id. at 555-56. This reasoned standard, and not the presumption of a prejudicial error, governs the federal courts.

VI. The Court of Appeals appropriately avoided a state law question by finding another basis for the jury's verdict.

Petitioner would require the Court of Appeals to go to extraordinary lengths – presume prejudicial error and review the sufficiency of evidence the appellant did not address – in order to decide an issue of Arkansas law and public policy. The federal courts should avoid such decisions. The Eighth Circuit properly found an evidentiary basis for the jury's general verdict without unnecessarily deciding an issue of Arkansas law. Even if the issue of the admissibility of Smith's comparative fault was a novel one

– and BMW contended it was not[10] – resolution of a question of Arkansas law and public policy would have been contrary to the rule that the federal courts should avoid the determination of legal questions that "might be more appropriately left to settlement in state court litigation. . . ." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 fn. 5 (1966). *See also Combs v. International Ins. Co.*, 354 F.3d 568, 577 (6 Cir. 2004) ("This Court's proper reluctance to speculate on any trends of state law applies with special force to a plaintiff in a diversity case, like this one, who has chosen to litigate his state law claim in federal court."); *Great Cent. Ins. Co. v. Insurance Services Office, Inc.*, 74 F.3d 778, 786 (7 Cir. 1996) ("a plaintiff who needs a common law departure or innovation to win should bring his suit in state court rather than in federal court"); *Galindo v. Precision American Corp.*, 754 F.2d 1212, 1217 (5 Cir. 1985) ("we remain mindful of our role in the system; it is not for us to adopt innovative theories of recovery or defense for Texas law. . . .").

It was not necessary for the Eighth Circuit to weigh in on the issue of the admissibility of the comparative fault evidence under Arkansas law – at the request of a litigant who chose to litigate in federal court. The court's refusal to do so was an appropriate exercise of its jurisdiction.

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[10] *See* fn. 7 above.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

No. 05-375

IN THE

Supreme Court of the United States

REGIONS BANK, GUARDIAN OF THE ESTATE OF KIMBERLY RENEA SMITH

Petitioner,

v.

BMW NORTH AMERICA, INC. AND BMW AG,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

THE PROCEDURAL ASPECTS OF THIS CASE PRESENT NO IMPEDIMENT TO REVIEW BY THIS COURT.

Respondent does not dispute the fact that the Question Presented by Petitioner is an important one that merits this Court's attention and which has generated a sharp split in the circuits. Instead, Respondent asserts that "significant procedural events and findings" make this case not appropriate for review. Opp. at i. In fact, Respondent's objections underscore the importance of this case as an appropriate vehicle to resolve the divergence of some federal courts from this Court's clearly stated rule for review of general verdicts.

1. Review of the Decision Below Does Not Require This Court to Decide an Issue of State Law.

Petitioner argued to the court of appeals that the evidence of plaintiff's blood alcohol was not relevant in this enhanced injury or "crashworthiness" case under Arkansas law. Alternatively, Petitioner argued that any such probative value was substantially outweighed by the danger of undue prejudice under Fed. R. Evid. 403. Appellant's Brief at 25-26.[1]

Repondent correctly states that the court below did not explicitly decide whether the admission of this evidence was error. Opp. at 8. It scarcely follows, however that the issue "is simply not ripe for consideration." *Id.* at 9.

The Eighth Circuit held that even if the evidentiary ruling were error, the verdict must stand because "We have no way of determining from this general verdict why the jury found [BMW] not liable," and therefore "Smith has failed to prove that the outcome of the trial was prejudiced by the admission of the evidence." 406 F.3d at 980. This is

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[1] Specifically, if plaintiff's neck was broken when her car rolled over, as Respondent contended, there would be no causal negligence or product defect and no liability irrespective of plaintiff's blood alcohol level. But Petitioner's evidence tended to show she was injured by being thrown forward during the front-end impact, and that is precisely the type of injury that the air bag was designed to prevent. What minimal probative value the evidence of intoxication had was substantially outweighed by its prejudicial impact on the Arkansas jury under Fed. R. Evid. 403. Appellant's Brief at 25-26.

precisely the opposite of the *Baldwin* rule, which the Court has consistently upheld.[2]

For this Court to reassert its rule for reviewing general verdicts and remand for its proper application does not require the Court to decide the underlying state law issue.

2. Petitioner Did Not Waive Objection To the Admission of Prejudicial Evidence of Intoxication.

a. Respondent contends that Petitioner waived any error because "Petitioner agreed to submit the case on a general verdict form." Opp. at 9. Petitioner challenged the blood alcohol testimony in a pretrial motion *in limine* and received a definitive ruling by the trial judge. Petitioner's right to assign error to the introduction of that testimony was thereby preserved. Fed. R. Evid. 103(a). The practice of using the *in limine* procedure is designed to assure that counsel will not have to jump up at each mention of the challenged evidence because continuous objections have the potential to distract and annoy the judge and jury. Although Fed. R. Civ. Pro. 49(b) permits a party to request that special interrogatories be submitted, it does not provide that failure to do so waives any error that such interrogatories might uncover.

Special interrogatories are undoubtedly useful in many circumstances. However, submitting interrogatories to determine whether the jury relied

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[2] "[The verdict's] generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld." Maryland v. Baldwin, 112 U.S. 490, 493 (1884).

on prejudicial evidence might well serve to highlight that evidence in the minds of the jurors. Failure to request Rule 49 interrogatories should not be deemed to waive objections that the litigant has otherwise preserved.

b. Respondent points to the fact that Petitioner did not object to the jury instructions on comparative fault. Opp. at 9. Petitioner assigned error to the introduction of irrelevant and highly prejudicial evidence. That she did not also object to the instructions did not waive the evidentiary error.

c. Respondent further notes that "Petitioner did not appeal the sufficiency of the evidence" that the airbag performed properly during the accident. Opp. at 9-10. Both sides presented extensive evidence concerning whether the airbag should have deployed when the car struck the hillside. The fact that Petitioner did not argue that Respondent's evidence was insufficient on that issue does not waive her objection to prejudicial testimony concerning intoxication.

The court of appeals below found no waiver by Petitioner of her objection to the introduction of the challenged evidence. Rather, the court held that Petitioner was not entitled to reversal because she could not prove the jury relied on that evidence in reaching its verdict. It is this ruling that warrants review by this Court.

3. If the Jury Could Have Found For BMW On Another Ground Without Considering the Evidence, the Proper Remedy Is a New Trial.

Respondent's third objection does no more than restate the minority position of the Seventh and

Eighth Circuits rejecting the *Baldwin* rule. Under the minority position, it is presumed that the alleged error did not affect the jury's verdict. An appellant is entitled to reversal only by demonstrating error in each and every alternative basis for the jury's verdict

This position has been described as:

> a maverick rule precisely the opposite of that repeatedly announced by the Supreme Court. In order to win on appeal in the Seventh Circuit, the defendant must show that none of the plaintiff's theories will support the general verdict. . . . For reasons explained in *Baldwin*, this rule makes no sense at all, never mind that it contravenes Supreme Court authority.

Kerr v. Levelor Lorentzen, Inc., 899 F.2d 772, 790-91 (9th Cir. 1990) (Kozinski, J., dissenting).

Indeed, this Court has already rejected Respondent's view. In *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the Court reversed and remanded judgment for Omni on a jury's general verdict due to erroneous instructions relating to *Noerr-Pennington* antitrust immunity. Omni contended that there was sufficient evidence to sustain the verdict on other, independent grounds.

Writing for the Court, Justice Scalia answered that the general verdict "cannot be permitted to stand." *Id.* at 365. However,

> [I]f the evidence was sufficient to sustain a verdict on the basis of these other actions alone, and if this theory of liability has been properly preserved, Omni would be entitled to a new trial.

Id.

4. That the Challenged Evidence Was Admitted on an Affirmative Defense Does Not Distinguish This Case From *Baldwin*.

Respondent observes that the asserted error below "is not directed to a threshold element of the plaintiff's case, but to an affirmative defense." Opp. at 14. In respondent's view "[t]his critical distinction removes the present case from the *Baldwin* 'general verdict' rule." *Id.*

Such a distinction is without significance, as this Court's own applications of *Baldwin* make clear. For example, in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), the Court, citing *Baldwin*, reversed judgment on a general verdict where the error below was in the application of an affirmative defense, that is, the statutory exemption of agricultural associations from federal antitrust laws. *Id.* 29-30. Similarly, in *City of Columbia v. Omni Outdoor Advertising, Inc., supra,* the Court reversed a general verdict in an antitrust action because the jury may have based its verdict on erroneous instructions concerning the affirmative defense of *Parker* and *Noerr* immunity. 499 U.S. at 384.

5. Reaffirmation of This Court's *Baldwin* Rule Will Not Destroy the Utility of the General Verdict Form.

Respondent correctly notes that most civil cases tried to juries in federal court "are resolved and always have been by a general verdict." Opp. at 16. This has been so since 1884 when this Court declared the *Baldwin* rule for review of general verdicts. It has remained so as this Court repeatedly confirmed that rule and as the overwhelming majority of courts of appeals applied it. This Court's

reversal of the Eighth Circuit's sharp departure from this Court's precedents poses no threat to the use of the general verdict form.

Respondent's position is that *Baldwin* applies "in some cases but not in others," and that in any case a party waives objection to prejudicial evidence "when the appellant did not object to the use of the general verdict form." Opp. at 17. It is Respondent who would extract too high a price for a party's use of the general verdict.

6. The Court of Appeals Should Address Whether Introduction of the Challenged Testimony Was Error.

Respondent's final point is that the lower court appropriately avoided deciding a state law question concerning the admissibility of evidence of intoxication as comparative fault.

Respondent is only half right. The court did not decide whether such evidence is relevant in an enhanced injury or "crashworthiness" case under Arkansas law. The court also did not reach Petitioner's alternative argument that, even if relevant, the evidence should have been excluded as unfairly prejudicial under Fed. R. Evid. 403. *See* note 1, *supra*.

It is entirely appropriate for the Eighth Circuit to reach these questions, and it has done so previously. For example, in *Pree v. Brunswick Corp.*, 983 F.2d 863 (8th Cir. 1993) the court upheld the district court's judgment that the manufacturer's unguarded outboard motor propeller was not defective as a matter of Missouri law. Though the issue was not determinative, the court also stated, "we conclude that evidence of intoxication is irrelevant in a strict

tort liability action for enhancement of injury." *Id.* at 866 n.3.

The question presented by Petitioner does not suggest that an appellate court in a diversity case may never avoid deciding state law issues. Rather, Petitioner contends that the lower court avoided the evidentiary issue by ignoring this Court's clear and consistent precedents concerning review of general verdicts.

CONCLUSION

For the reasons given above and in the Petition, the Petition for a writ of certiorari should be granted.

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